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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/047,274	10/23/2001	Santiago A. Olavarria	SK-1	4499

7590 09/30/2003
PAUL W. GARBO
49 Lester Avenue
Freeport, NY 11520

EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 09/30/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/047,274	OLAVARRIA, SANTIAGO A.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on _____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☒ Claim(s) 12-20 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barnes et al. (5,599,573) in view of Miller et al. (5,500,236)

Barnes et al. disclose a process of producing an acidified pasta product by forming a pasty mixture of grain flour and egg white and extruding the pasta and steaming at from 85 to 100 C. (col. 1, lines 40-60, col. 3, lines 4-8, lines 24-30). Claims 8-10 differ from the reference in the intended use and in the use of superheated steam. However, nothing is seen that pasta cannot be a snack because the claimed ingredients have been shown, and also the claim is not limited by its intended use. As to superheated steam, the claim does not state what temperature this would be. Also, obviously, the steam of the reference to Barnes et al. is under pressure, as steam is not normally produced unless the temperatures are at least boiling. Miller et al. state that pressure lowers the precooking temperatures and times (col. 6, lines 10-15). It is not seen at this time that pressurized steam is not comparable in temperature to superheated steam. In addition, nothing critical is seen at this time in the use of

Art Unit: 1761

superheated steam, as product would have been cooked at pressurized temperatures also. Therefore, it would have been obvious to make a product which is a snack product, because the claimed ingredients have been shown, and it would have been obvious to use various temperatures as shown by the references which would have been comparable to the claimed temperatures.

Claim 11 further requires that the contact with the superheated steam with the formed snacks is about 2 minutes or less. However, it is seen that it would have been within the skill of the ordinary worker to steam a product at whatever length of time would have been necessary, in view of the ingredients used in the composition and the amount of cooking required for these products. Therefore, it would have been obvious to steam for a particular amount of time.

Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 8-11 above, and further in view of Jones (6,432,457) in view of Evenson et al (6,558,718).

Jones discloses an extruded confectionery product containing ingredients made from grain (polydextrose) and a minor proportion of egg white (abstract and col. 4, lines 7-7-15 and lines 55-59 and col. 6, lines 32-45, lines 50-60). The reference discloses the use of peanut flour (col. 6, lines 50-60), which is not a grain flour. However, Evenson et al. disclose a nutrient cluster, which contains egg white as a binder of oats (abstract and col. 4, lines 45-60, col. 5, lines 16-25, col. 8, lines 7-15, col. 12, lines 48-55). The nutrient clusters can be added to other grain or cereal ingredients to make a snack product (col. 12, line 53). Jones is to a low calorie diet bar. However, if one did not

Art Unit: 1761

want a low calorie product, it would have been obvious to substitute the cereal mixtures of Evenson et al. for the peanut flour of Jones because generally something needs to provide structure to the product such as the peanut flour of Jones or the grains of Evenson et al. Claims 1-7 are also product by process claims (claims 4 and 7 in particular). The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See *In re Thorpe* 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See *Ex parte Jungfer* 18 USPQ 2D 1796. Therefore, it would have been obvious to make a snack containing the claimed ingredients as shown by the combined references.

Claims 2 and 5 require various grains and pasta. Barnes et al. disclose the use of pasta in an extruded food as described above. Therefore, it would have been obvious to use known ingredients to make a snack food.

Pasty mixtures as in claims 3 and 6 are disclosed by Jones, who uses peanut flour as above. Also, Barnes et al. use a pasty mixture to produce pasta of flour and water (col. 2, lines 40-61). Therefore, it would have been obvious to use flours in the claimed composition.

Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zukin (*Dairy-Free Cookbook*, p. 299).

Zukin discloses a cookie containing egg whites and grain, which is flour as in claims 1, 3. Claims 1 and 3 differ from the reference in the processing steps. However, processing steps are not given weight in a composition claim. Also, In re Thorpe, supra, applies. Therefore, it would have been obvious to make a composition with the claimed ingredients.

Allowable Subject Matter

Claims 11-20 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 9-24-03

H. Pratt
HELEN PRATT
PRIMARY EXAMINER